

The Role of NGOs in International Environmental Litigation

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I. Introduction

In today's international environmental relations NGOs represent a multitude of private interests. Their ever-increasing presence gives evidence of an emerging international civil society which is going to become, to a certain extent, a counterpart to the community of States which for decades has clearly dominated the international arena. NGOs provide for suitable participation of the public at international, regional and sub-regional level, but they hardly stand for the democratization of global environmental governance. Whether their growing involvement in international environmental decision-making processes is accompanied by their becoming (limited) subjects of international law, is an open question.

The following deliberations will focus on NGO participation in international environmental litigation. They will be developed in four steps:

First, it will be examined whether NGOs may have access to the proceedings before international courts and tribunals as parties or *amici curiae*. Second, the same question will be raised with regard to NGO participation in international quasi-judicial proceedings. Third, due to the fact that States show considerable reluctance to become involved in adversarial dispute settlement proceedings before international courts, there will be a short look at the possibilities of NGOs to participate in compliance control procedures which are gaining more and more importance in international environmental treaty practice. Finally, some conclusions will be drawn from the foregoing findings.

II. NGO Participation in the Proceedings before International Courts and Tribunals

The following survey of international judicial proceedings will reveal a number of statutes and procedural rules which indicate what the NGOs' role in inter-State environmental dispute settlement could be. It should be clear from the outset that there are two types of NGO participation in international judicial litigation which considerably differ from each other: access as a party (or third party), on the one hand, and participation as *amicus curiae*, on the other.

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1. Participation as a Party

Even today most international courts, whether permanent or established ad hoc, are not prepared to admit NGOs as parties in their contentious proceedings. Thus, NGOs are not permitted to bring an action before the International Court of Justice (ICJ)¹ or the WTO dispute settlement bodies. Among the very few international courts and tribunals offering access to NGOs as parties (or third parties) the following may be included:

a) International Tribunal of the Law of the Sea (ITLOS)

According to Art. 187 (c) of the Law of the Sea Convention not only States parties, but also “state enterprises and natural or juridical persons referred to in article 153, paragraph 2 (b)” may have access as parties to the proceedings before the Sea-Bed Disputes Chamber. Furthermore, Art. 285 of the Law of the Sea Convention of 1982 provides that an “entity other than a State Party” may have recourse to the non-compulsory procedures of dispute settlement with regard to disputes submitted pursuant to Part XI of the Convention; moreover, they may have direct access to arbitration according to Art. 287, para. 1 (c) and (d) in accordance with Annexes VII and VIII². However, it appears that only profit-oriented private companies are the beneficiaries of these provisions³. Consequently, NGOs have no standing in the proceedings before the ITLOS.

b) European Court of Justice (ECJ)

As to the ECJ, the legal situation is slightly different. As private legal persons, NGOs belong to the group of the so-called non-privileged plaintiffs. They only have standing in the proceedings before the ECJ if their members themselves may bring an action before the Court⁴. Consequently, in the *Greenpeace Case* the

¹ According to Art. 34, para. 1, of the ICJ Statute “(o)nlly states may be parties in cases before the Court”. Compare also Arts. 62 and 63 of the Statute with regard to the right to intervene.

² Both Annexes make clear that they “shall apply *mutatis mutandis* to any dispute involving entities other than States Parties” (Art. 13 of Annex VII and Art. 4 of Annex VIII; see their texts in: K. Oellers-Frahm/A. Zimmermann [eds.], *Dispute Settlement in Public International Law*, 2nd edition [2001], 1317 and 1319). Art. 20, para. 2, of the Statute of the ITLOS of 1997 provides that “(t)he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case” (text: *ibid.*, 1266). Compare S. Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (2001), 223 et seq.

³ Compare F. Orrego Vicuna, *Individuals and Non-State Entities before International Courts and Tribunals*, *Max Planck Yearbook of United Nations Law* 5 (2001), 53 et seq.

⁴ Art. 230, para. 4, of the EC Treaty reads as follows: “Any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or addressed to another person, is of direct and individual concern to the former.” Compare D. Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, *AJIL* 88 (1994), 611, at 628 et seq.

European Court of First Instance held "that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty⁵ by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually ... Furthermore, special circumstances such as the role played by an association in the procedure which led to the adoption of an act within the meaning of Article 173 of the Treaty may justify holding admissible an action brought by an association whose members are not directly and individually concerned by the contested measure"⁶. However, in the opinion of the European Court of First Instance no such special circumstances were present in the case at hand. This holding was confirmed by the European Court of Justice in its decision of 2 April 1998⁷.

c) *Human rights control systems in Europe, Inter-America and Africa*

These systems might prove to be an exception to the rule that NGOs do not have standing in international judicial proceedings. They have in common that not only individuals, but also NGOs can address the competent control bodies by claiming human rights violations. However, under none of these regional human rights conventions has a considerable practice of NGO complaints in environmental affairs been developed to date.

aa) European human rights system

Art. 34 of the European Convention on Human Rights (ECHR) of 1950⁸ reads as follows: "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto ..."⁹. Consequently, NGOs may bring a human rights complaint directly before the Court, but as claimants they are required to show that they are victims of a human rights violation. They are not

⁵ Now Art. 230 para. 4 EC Treaty.

⁶ Order in the case *Stichting Greenpeace Council v. EC Commission* T-585/93, ECR 1995 II-2218 (2230).

⁷ Decision, C-321/95 P, ECR 1998 I-1651. Compare J. Peel, Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization, *Colorado Journal of International Environmental Law and Policy* 12 (2001), 47, at 50 et seq., and Riedinger (note 2), 235 et seq.

⁸ The control system of the ECHR has been reshaped by the Eleventh Protocol to the Convention, which came into force at the end of 1998; see the revised text of the ECHR in: BGBl. 1995 II, 579.

⁹ Oellers-Frahm/Zimmermann (note 2), 451 et seq.

allowed to institute an *actio popularis*¹⁰. In most cases, NGOs are not able to pass this test.

As legal persons, NGOs cannot invoke individual rights and freedoms, such as the right to life (Art. 2 ECHR) or the right to privacy (Art. 8 ECHR), but only rights determined to protect legal persons as well. Among those rights are in particular the freedom of information (Art. 10 ECHR) and access to court (Art. 6 ECHR)¹¹.

In the early 1980s, Commission and Court began to establish case law concerning human rights protection in environmental affairs. Meanwhile, there is a considerable number of relevant rulings¹². However, NGOs have so far not had any success as claimants.

bb) Inter-American human rights system

Under the Inter-American human rights system¹³ NGOs are entitled to submit petitions to the Inter-American Human Rights Commission, but not to the Inter-American Human Rights Court. This follows clearly from Art. 44 of the American Convention on Human Rights, which reads as follows: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State party"¹⁴. However, contrary to the ECHR, the petitioners do not have to show that they are victims of the alleged human rights violations¹⁵.

¹⁰ See e.g. the Decision of the European Commission on Human Rights in the case *Narvii Tauira v. France* of 4 December 1995, declaring that the application of some Polynesian individuals who had argued that they suffered from the detrimental effects of a series of French nuclear tests on Mururoa was manifestly ill-founded (Decisions and Reports 83 B [Dec. 1995], 112). Compare K. Rogge, The "Victim" Requirement in Article 25 of the European Convention on Human Rights, in: F. Matscher/H. Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in Honour of G.J. Wiarda* (1988), 539 et seq.; J.A. Frowein/W. Peukert, *Europäische Menschenrechtskonvention, EMRK-Kommentar*, 2nd ed. (1996), 531 et seq.

¹¹ For a comprehensive analysis of relevant case law see R. Schmidt-Radefeldt, *Ökologische Menschenrechte* (2000), 55 et seq.

¹² Perhaps most important is the Court's judgment of 9 December 1994 in the case *López Ostra v. Spain* (Series A, No. 303-C), which recognized that applicants residing in very close proximity to an environmentally harmful activity can be victims of a violation of their right to respect for home and private and family life under Art. 8 of the ECHR.

¹³ This system consists of the American Convention on Human Rights of 22 November 1969 (text in: ILM 9 [1970], 673; Oellers-Frahm/Zimmermann [note 2], 522 et seq.), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 17 November 1988 (text in: ILM 28 [1989], 156).

¹⁴ Text in: Oellers-Frahm/Zimmermann (note 2), 524. However, NGOs are entitled to submit *amicus* briefs to the Inter-American Court of Human Rights; see C. Moyer, *The Role of Amicus Curiae in the Inter-American Court of Human Rights*, in: *La Corte Interamericana de Derechos Humanos. Estudios y Documentos* (1999), 119 et seq.

¹⁵ This is confirmed by Art. 23 of the Rules of Procedure of the Inter-American Commission on Human Rights of 1 May 2001, which states: "Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the OAS may submit petitions to

cc) African human rights system

In June 1998, 30 member States of the Organization of African States (OAS) signed the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights¹⁶. This court may, under certain conditions, entitle NGOs to institute cases directly before it¹⁷. However, so far there is no practice in this respect¹⁸. Preceding the adoption of the 1998 Protocol, the African Human Rights Commission was entitled to deal with any State action alleging that another State party has committed a human rights violation¹⁹, as well as with any communications made by NGOs²⁰. The latter could even complain in cases where the alleged human rights violations did not affect their own rights²¹.

d) Assessment

What follows from this short survey is that access of NGOs as parties (or third parties) to international courts or tribunals depends on the nature of the dispute concerned. In any case where one State is accused by another of having committed a breach of international law, an inter-State conflict is at stake which usually is not of any direct private concern. In this type of dispute NGOs are hardly able to show a legitimate interest in being admitted as parties (or third parties) in the judicial proceedings concerned. Consequently, NGOs do not have access as parties to international courts or tribunals dealing with inter-State disputes, such as the ICJ, the ITLOS, and the WTO dispute settlement bodies.

In inter-State disputes concerning environmental affairs which lack any human rights dimension, NGOs will not be able to bring an action before an international court, as long as they are not entitled under international treaties to undertake

the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, ... etc." (ILM 40 [2001], 752, at 757).

¹⁶ Protocol of 9 June 1998; see its text in: Oellers-Frahm/Zimmermann (note 2), 625 et seq.

¹⁷ Art. 5, para. 3, of the said Protocol reads as follows: "The Court may entitle the relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it..." (ibid., 627), provided that in accordance with Art. 34, para. 6, of the Protocol the State party concerned by such a complaint has made "a declaration accepting the competence of the Court to receive cases" (ibid., 632).

¹⁸ Compare N. Kriech, The Establishment of an African Court on Human and Peoples' Rights, ZaöRV 58 (1998), 713, at 724.

¹⁹ Arts. 47–54 of the African Human Rights Charter (text in: Oellers-Frahm/Zimmermann [note 2], 596 et seq.).

²⁰ Art. 55 of the Charter is silent in this respect ("communications other than those of States parties to the present Charter").

²¹ Actually, African human rights practice shows that the NGOs have made use of this right, although not in the context of environmental protection. Compare W. Benedek, Durchsetzung von Rechten der Menschen und der Völker in Afrika auf regionaler und nationaler Ebene, ZaöRV 54 (1994), 150, at 154 et seq., and M. Hempel, Die Völkerrechtssubjektivität internationaler nicht-staatlicher Organisationen (1999), 110 et seq.

legally meaningful, independent activities in international environmental relations. The more they will be actively brought into play in future, the less arguments against their admittance as parties (or third parties) in these proceedings can be raised. Certainly, under some environmental treaties NGOs participate in the process of treaty implementation. For instance, CITES²² provides that its secretariat²³ “may be assisted by suitable intergovernmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild flora and fauna”²⁴. Under some more recent instruments, such as the Kyoto Protocol²⁵ and the Biosafety Protocol²⁶, the respective Conferences of the Parties shall “seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies”. More specified is the role NGOs have to play in the implementation process under the Desertification Convention of 1994²⁷. Pursuant to Art. 5 d) of this Convention, affected country Parties undertake to promote awareness and facilitate the participation of local populations ... with the support of non-governmental organizations, in efforts to combat desertification ...”. This supporting role of NGOs is specified in Arts. 13²⁸ and 14²⁹. However, under all these provisions NGOs are restricted to a mere serving function. They are barred from undertaking legally meaningful, independent action³⁰.

The situation in human rights cases is different. The human rights control systems in Europe, America and Africa have in common that individuals as well as NGOs can claim human rights violations. However, there are considerable differences with regard to the modalities of access. Under the ECHR an application made by an NGO is only admissible if the latter proves to be victim of a human rights violation. Consequently, NGOs may address the European Human Rights Court only in cases where one of their procedural human rights is at stake. As regards the Inter-American human rights system, NGOs can lodge human

²² Convention on International Trade in Endangered Species of Wild Flora and Fauna of 3 March 1973 (text in: ILM 12 [1973], 1055).

²³ It was up to the Executive Director of UNEP to provide for that secretariat.

²⁴ Art. XII of CITES.

²⁵ Art. 13, para. 4 (i), of the Kyoto Protocol of 10 December 1997 to the 1992 Framework Convention on Climate Change (text in: ILM 37 [1998], 22).

²⁶ Art. 29, para. 4 (c), of the Cartagena Protocol on Biosafety of 29 January 2000 to the Convention on Biological Diversity (text in: ILM 39 [2000], 1027).

²⁷ Convention to Combat Desertification of 17 June 1994 (text in: ILM 33 [1994], 1328).

²⁸ Art. 13, para. 1 (b): “Measures to support action programmes ... include ... elaboration and use of cooperation mechanisms which better enable support at the local level, including action through non-governmental organizations, in order to promote the replicability of successful pilot programme activities where relevant ...”.

²⁹ Art. 14, para. 2: “The Parties shall develop operational mechanisms, particularly at the national and field levels, to ensure the fullest possible coordination among developed country Parties, developing country Parties and relevant intergovernmental and non-governmental organizations ...”.

³⁰ This kind of empowerment does not indicate the upgrading of NGOs to subjects of international law.

rights petitions to the Inter-American Human Rights Commission also on behalf of third persons. However, they are not allowed to address the Inter-American Human Rights Court directly. As to Africa, the African Human Rights Court to be established under the 1998 Protocol may invite NGOs to institute cases directly before it without requiring them to be victims of a human rights violation. However, none of these regional systems has shown a considerable practice of NGO complaints in environmental affairs so far.

Due to their mission of defending the interests of civil society, NGOs show a much closer relationship to human rights issues than to inter-State affairs. This is why they should be entitled to bring a case before the human rights courts even if they cannot claim to be victims of human rights violations. Actually, there is much in favour of arguing that NGOs, in particular those specifically committed to defending human rights, should be entitled to act on behalf of affected individuals, whether they are NGO members or non-members. However, as shown above, the European Human Rights Court still handles the "victim" requirement in Art. 34 of the ECHR rather strictly in order to avoid any *actio popularis*. Since respecting human rights is of fundamental concern for the public, the Court should interpret the "victim" requirement more flexibly in future. Such a widening of standing for NGOs could help establish a much more effective and comprehensive system of ecological human rights protection in Europe.

2. Participation as *amicus curiae*

There is ongoing debate on whether NGOs may participate in international judicial proceedings as *amici curiae*, whose status remains far behind that of parties (or third parties).

The role of any *amicus curiae* in international judicial proceedings is generally restricted to assisting the court or tribunal concerned. Although limited to equipping a court with relevant information and expertise, this function should not be underestimated. It ensures that the court concerned will make its decision in full knowledge and awareness of the private concerns affected, or likely to be affected, by the outcome of that decision.

Amicus participation stands in clear contrast to third-party intervention, which is designed to protect the legal interests or rights of the intervening entity likely to be affected by the expected judgement³¹. Since NGOs mostly fail to show that they themselves have such legal interests, they can, at best, attempt to get *amicus* status.

³¹ See Institut de Droit International, Final Report on Judicial and Arbitral Settlement of International Disputes involving more than Two States (1998), at 113.

a) *Permanent international courts*

Permanent international courts, such as the ICJ and the ITLOS³², prove to be very reluctant to acknowledge non-governmental *amicus* participation in their contentious proceedings³³. The ICJ has never officially accepted it³⁴. It may do so in its advisory proceedings³⁵, but also in this respect, NGOs have had only limited success in practice³⁶. The ICJ's attitude contrasts with the more liberal attitude of its predecessor, the Permanent International Court of Justice (PICJ), which showed a tendency to give the term "international organization" used in Art. 66 of its Revised Statute a broad interpretation³⁷.

b) *WTO Appellate Body*

Most recently, the WTO Appellate Body has shown a rather friendly attitude towards NGOs. In the *Shrimp-Turtle* Case the Appellate Body held on 6 November 1998 "that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the

³² Under the Rules of the Tribunal of 28 October 1997 (text in: Oellers-Frahm/Zimmermann [note 2], 1270) NGOs are not entitled to submit an application for being admitted as *amici curiae*. Pursuant to Art. 84 of these Rules only "intergovernmental organizations" may be requested by the Tribunal to furnish information relevant to a case before it (ibid., 1291 et seq.).

³³ In contrast, the European Human Rights Court and the Inter-American Human Rights Court apparently accept NGOs as *amici curiae*. Rule 61, para. 3, of the EHRC Rules of 1998 provides: "In accordance with Article 36 § 2 of the Convention, the President may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in an oral hearing. Requests for leave for this purpose must be duly reasoned ..." (ibid., 476). The Inter-American Court has accepted *amicus* briefs, with the inclusion of those submitted by NGOs, from its first case, although the Court is not explicitly authorized to do so by the Court's Rules of Procedure. Moreover, NGOs have apparently begun to participate in oral proceedings before the Court; see for more details Shelton (note 4), 638 et seq. There is also ample practice under Art. 18, para. 1, of the Statute of the International Tribunal for the Former Yugoslavia of 25 May 1993, as amended on 13 May 1998, according to which the Prosecutor shall initiate investigations, inter alia, on the basis of information obtained from any non-governmental organization (text in: Oellers-Frahm/Zimmermann [note 2], 1794).

³⁴ Art. 34, para. 2, provides that the Court "may request of public international organizations information relevant to cases before it ..." (ibid., 46). Consequently, Art. 69 para. 4 of the Rules of the Court states that "public international organization" only means an "international organization of States" (ibid., 72 et seq.). Nonetheless, in the Case Concerning the *Gabcikovo-Nagymaros Project* of 1997, the ICJ was reported to have unofficially received written NGO submissions.

³⁵ Pursuant to Art. 66, para. 2, of the ICJ Statute "any international organization" considered likely to be able to furnish information shall be notified by the Registrar "that the Court will be prepared to receive ... written statements, or to hear, in a public sitting to be held for the purpose, oral statements relating to the question" (ibid., 51).

³⁶ Only in the 1950 South-West Africa advisory proceeding was the Court prepared to receive a written statement from the International League for Human Rights.

³⁷ Compare Shelton (note 4), at 621, 623.

provisions³⁸ of the DSU³⁹. At the outset of its reasoning the Appellate Body stressed that access to the dispute settlement process of the WTO is not available to individuals or international organizations, whether governmental or non-governmental. Consequently, it assumed that “only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute ..., have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel”⁴⁰. However, the Appellate Body emphasized that it is “within the province and the authority of a panel to determine the need for information and advice in a specific case ...”⁴¹.

With regard to non-requested information submitted by an NGO, the Appellate Body concluded that “authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not”⁴².

The reaction of WTO member States to the Appellate Body’s new policy with regard to the handling of non-solicited NGO briefs was deeply split. While the United States and European States supported the NGOs’ right to submit briefs to dispute settlement panels, other States, such as Thailand, Malaysia, Singapore, India, Pakistan, and Brazil, held that only parties and third parties to a dispute should have the right to present written submissions. They stressed that NGO participation in the proceedings under the DSU was for the WTO member States rather than the panels or the Appellate Body to determine⁴³.

In November 1998 the WTO Appellate Body had found that there was not enough scientific evidence to back Australia’s claim that imports of fresh, frozen and chilled Pacific salmon would threaten the health of native salmonid stocks⁴⁴. After that ruling, Australia conducted an import risk-analysis and replaced its import ban with new regulations that required all salmons imported to the country from regions where certain diseases occur to be “consumer-ready”. Canada con-

³⁸ Art. 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) does not explicitly tackle the question of admissibility of NGO briefs. It only provides: “1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member ... 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter ...” (Oellers-Frahm/Zimmermann [note 2], 650).

³⁹ Report of 6 November 1998 (WT/DS58/AB/R), para. 110.

⁴⁰ *Ibid.*, para. 101.

⁴¹ *Ibid.*, para. 104.

⁴² *Ibid.*, para. 108. Compare also the Report of the Panel in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to article 21.5 by Malaysia, 15 June 2001 (WT/DS58/RW), paras. 3.5 to 3.15 and 5.14 to 5.16.

⁴³ See ICTSD, Bridges, WTO News, Vol. 2, No. 8, November/December 1998, 8 et seq.

⁴⁴ See Report of the Appellate Body in the case *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998 (WT/DS18/AB/R). Compare Bridges, WTO News, Vol. 4/2, No. 8, March 2000, 7.

tested the new Australian measure. On 28 July 1999 it requested WTO arbitration of Australia's compliance with the Appellate Body's ruling. On 18 February 2000, the WTO panel ruled that Australia's measures to comply with an adverse ruling on its import restrictions were not consistent with the Appellate Body's findings made in November 1998⁴⁵. On a separate point, the panel confirmed that it had considered information contained in a non-requested letter from an NGO, called "Concerned Fishermen and Processors" in South Australia, "as relevant to its procedures and accepted this information as part of the record"⁴⁶, thereby explicitly referring to the 1998 ruling of the Appellate Body in the *Shrimp-Turtle* Case.

In November 2000, in a case between Canada and France concerning the latter's import ban on asbestos, the Division of the Appellate Body hearing Canada's appeal established the "Additional Procedure for Purposes of Canada's Appeal Only"⁴⁷. Under the Additional Procedure "any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body within a given time-limit". Moreover, the potential applicants have to meet a number of qualifying conditions⁴⁸. A considerable number of WTO members re-aired their longstanding systemic concern with regard to the Appellate Body's invitation to NGOs to file *amicus* briefs. They criticized the fact that the new procedure confers on outsiders more access to WTO justice than on Member governments that are not directly involved in the dispute, thereby weakening the government-to-government nature of the dispute settlement process under the DSU⁴⁹.

Pursuant to the Additional Procedure, the Appellate Body received 17 NGO applications requesting leave to file a written brief in this appeal. However, in its Report of 12 March 2001⁵⁰, the Appellate Body decided to deny these applications for failure to comply sufficiently with all the requirements set forth in the Additional Procedure⁵¹.

⁴⁵ Report of the Panel in the case *Australia – Measures affecting importation of Salmon – Recourse to Article 21.5 by Canada*, 18 February 2000 (WT/DS18/RW).

⁴⁶ *Ibid.*, 101 et seq.

⁴⁷ See Doc. WT/DS135/9 of 8 November 2000. It is reprinted in ILM 40 (2001), 497.

⁴⁸ "The application shall be made in writing; ... specify the nature of the interest the applicant has in this appeal; ... state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute ...; and contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief" (*ibid.*, at 498).

⁴⁹ Compare ICTSD, *Bridges*, Vol. 4, No. 9, Nov.-Dec. 2000, 4.

⁵⁰ Case *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001.

⁵¹ *Ibid.*, paras. 55 et seq.

c) *Arbitral tribunal under Chapter 11 of NAFTA*⁵²

Another interesting case dealing with the *amicus* status of NGOs is the recent dispute between the Canadian Methanex Corporation and the United States which was brought before an arbitral tribunal established under Chapter 11 of NAFTA. In August 2000, a Canadian NGO, which was later joined by three U.S. NGOs, filed a petition seeking *amicus* status in the proceedings before the Tribunal⁵³.

On 15 January 2001 the Tribunal ruled⁵⁴ that pursuant to Art. 15, para. 1 of the UNCITRAL Arbitration Rules⁵⁵ it has the power to accept *amicus* written submissions from the above-mentioned NGOs, although there are no provisions in Chapter 11 of NAFTA that touch directly on that question.

Moreover, the Tribunal observed: "There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State ... The public interest in this arbitration arises from its subject-matter ... (T)he Chapter 11 arbitral process could benefit from being perceived as more open or transparent ... (T)he Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm"⁵⁶.

d) *Assessment*

Presently, some permanent international courts are not ready to consider the admittance of NGOs as *amici* in an unreserved way. For instance, the International Court of Justice still appears to reserve such a role to "international organizations of States", thereby barring NGOs from its proceedings. The ITLOS rules of procedure of 1997 show the same negative approach. In contrast to the ICJ and ITLOS, most recently the WTO Appellate Body has developed a rather friendly attitude towards NGOs⁵⁷. However, this progressive policy has provoked the

⁵² North American Free Trade Agreement between Canada, Mexico and the United States of 8–17 December 1992 (text in: ILM 32 [1993], 289).

⁵³ The Canadian NGO requested permission to present written submissions, to see the briefs and counter-briefs filed by the parties, to make oral submissions, and to have observer status at oral arguments presented by the parties.

⁵⁴ Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae"; see its text in: World Trade and Arbitration Materials, Vol. 13, No. 3, June 2001, 97. Compare also the Report in: International Environment Reporter (IER) 24 (2001), 85.

⁵⁵ Arbitration Rules of the United Nations Commission on International Trade Law, approved by the UN General Assembly on 15 December 1976. Art. 15, para. 1, of these Rules requests adjudicating bodies to conduct judicial review in the manner they deem appropriate while respecting due process. There is no explicit reference to *amicus curiae* briefs.

⁵⁶ Para. 49 of the Tribunal's Decision of 15 January 2001 (note 54).

⁵⁷ For an analysis of NGO participation in WTO matters in general see W. Benedek, Developing the Constitutional Order of the WTO – The Role of NGOs, in: W. Benedek/H. Isak/R. Kicker (eds.), Development and Developing International and European Law, Essays in Honour of Konrad Ginther (1999), 228 et seq.

strong opposition of some WTO members, in particular those which are developing countries. Apparently sticking to traditional sovereignty thinking, this group of States refuses to accept that decisions on the admittance of NGOs as *amici* should be within the authority of the WTO panels. Notwithstanding these objections the Appellate Body seems to be adhering to its new policy. However, its newly established "Additional Procedure" indicates that NGOs which want to submit non-requested *amicus* briefs have to meet a number of conditions. If enlarged and strengthened, the latter may bring more predictability and transparency to the Appellate Body's future policy towards NGOs⁵⁸.

The *amicus curiae* role of NGOs is a modest one, since it does not immediately influence on the outcome of the court's final decision. Nevertheless, acting as representatives of civil society, NGOs are able to provide for a minimum of public control. This is why in future all international courts and tribunals dealing with inter-State disputes should pledge themselves to consider open-mindedly the admittance of NGOs as *amici* in all cases, provided that the NGOs applying for that status meet some minimum qualifications to be generally determined in advance by the courts concerned⁵⁹.

III. NGO Participation in the Proceedings before International Quasi-Judicial Bodies

Even today many States take the position that the participation of NGOs as parties, third parties and even *amici curiae* in the proceedings before an international court which is competent for making a legally binding decision in a dispute concerning inter-State affairs imperils their sovereign interests. The situation might be different in cases where an NGO makes a complaint about the violation of private interests before an international body which employs means of dispute settlement other than legally binding judgements. Such types of dispute settlement are, at best, quasi-judicial in character. They certainly have less impact on State sovereignty, since the States involved remain legally free to decide whether or not to comply with the body's findings. Thus, NGO participation in the proceedings before an international quasi-judicial body might prove to be a promising alternative to their participation in proceedings before an international court or tribunal.

⁵⁸ Compare Peel (note 7), at 64 et seq.; S. Ohlhoff/H. Schloemann, *Transcending the Nation State? Private Parties and the Enforcement of International Trade Law*, Max Planck Yearbook of United Nations Law 5 (2001), 675 et seq.; P.C. Mavroidis, *Amicus Curiae* Briefs before the WTO: Much Ado about Nothing, in: *Festschrift für C.-D. Ehlermann* (forthcoming).

⁵⁹ For a more intensive discussion see below under V.

1. World Bank's Inspection Panel

a) Function and current practice

The World Bank's Inspection Panel was established on the basis of the 1993 World Bank Resolution⁶⁰. This three-member body, through which non-state actors, in particular NGOs and any other groupings of individuals, can hold the Bank accountable for non-compliance with its own standards, was unprecedented in the world of international organizations⁶¹. Persons intending to submit inspection requests to the Panel are required to demonstrate that their rights or interests are affected by the Bank's failure to act properly⁶². However, in accordance with the "1999 Clarifications"⁶³, the Panel has to put less weight on this requirement than on an alleged non-compliance by the Bank with its own operational standards⁶⁴. Consequently, requesters hardly run the risk of being refused for reasons of their lacking standing. Recently, the Panel even accepted a non-local NGO as a requester⁶⁵.

⁶⁰ The Resolution Establishing the Inspection Panel IBRD Resolution N. 93-10 and IDA Resolution 93-6 of September 22, 1993 (hereinafter "World Bank Resolution"); see its text in: ILM 34 (1995), 520.

⁶¹ The World Bank's decision to establish an investigation mechanism was followed by the Inter-American Development Bank and the Asian Development Bank in 1994 and 1995. Compare S.Schlemmer-Schulte, *The World Bank Inspection Panel: A Record for the First International Accountability Mechanism and Its Role for Human Rights*, in: <http://www.wcl.american.edu/pub/humright/brief/v6i2/worldbank.html> (visited: 1 March 2001).

⁶² Pursuant to § 12 of the 1993 World Bank Resolution a request for inspection can be made by any "... affected party in the territory of the borrower which is not a single individual (i.e. a community of persons such as an organization, association, society or other grouping of individuals)".

⁶³ In 1996 and 1999 the Panel has been subject to two general reviews by the Bank's Board of Executive Directors. The Clarifications to the Resolution Establishing the Panel of 17 October 1996 (1996 Clarifications), as amended and revised by the Conclusions of the Board's Second Review of the Inspection Panel of 20 April 1999 (1999 Clarifications) (see the latter's text in: ILM 39 [2000], 249), they qualify as an authoritative commentary on the Resolution, including general interpretations of notions in the Resolution and flexible practices developed under it and approved of by the Board.

⁶⁴ Complaints must state all relevant facts, including "the harm suffered or threatened as a result of the Bank's failure to follow its operational rules and procedures"; moreover, they must demonstrate that the rights of the affected party have been or are likely to be "directly affected" by acts of omissions of the Bank that are inconsistent with its "operational policies and procedures". The "1999 Clarifications" cited above (see *ibid.*) contain a number of "technical eligibility criteria", such as the following: "(a) The affected party consists of any two or more persons with common interests or concerns and who are in the borrower's territory ... (b) The request does assert in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester ... (c) The request does assert that its subject matter has been brought to Management's attention and that, in the requester's view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank's policies and procedures ..." (*ibid.*, 250).

⁶⁵ As a rule, only "a local representative" of the said parties can submit a request to the Panel request. However, in accordance with the 1993 Resolution "another representative is also allowed to do so in the exceptional cases where the party submitting the request contends that appropriate representation is not locally available and the Executive Directors so agree at the time they consider

The Inspection Panel process works as follows: In the first stage the Panel assesses whether the request submitted meets the eligibility requirements mentioned above. Based on this assessment, it passes a recommendation to the Board of Executive Directors on whether or not to authorize an investigation⁶⁶. The second stage is reserved to the investigation process. At the end of this process the Panel submits a report with its factual findings to the Board of Directors. Within six weeks, the Bank Management has to provide the Board with its response to the Panel's findings. Based on both, the Board makes its final decision which, together with the Panel report and the Management response, is made public⁶⁷.

The Panel's work began in September 1994. To date it has received a total of 19 inspection requests concerning, in particular, infrastructure as well as environmental and land reform projects which have been financed by either the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA). About half of the requests were filed by non-governmental groups and organizations, either representing themselves⁶⁸, or acting for and on behalf of adversely affected individuals in the project areas con-

the request for inspection". In the case *China: Western Poverty Reduction Project* (Credit No. 32550 CHA and Loan No. 4501-CHA), INSP/R99, 18 June 1999, a U.S.-based NGO called "International Campaign for Tibet (ICT)" submitted an inspection request for and on behalf of Tibetan and Mongolian ethnic peoples living in the Qinghai project area. Interestingly, the Bank's Board of Executive Directors authorized the Panel to conduct an investigation into the Qinghai Project without deciding on the question of appropriate representation. With China's withdrawal of its application for the Qinghai loan and the Bank's departure from the project the case was terminated in July 2000. Compare S.R. Roos, *The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case*, Max Planck Yearbook of United Nations Law 5 (2001), 473 et seq.

⁶⁶ The "1999 Clarifications" determine a number of aspects of the Panel's function and procedures. Particularly important is the recognition that in the first stage of the Panel process the assessment of Bank failures concerning compliance with its policies and procedures should precede an assessment of harm suffered by the requester. This first stage is not about the merits of the complaint, i.e. a true finding of harm, but an assertion only. Due to the fact that the Inspection Panel is to be qualified as an accountability mechanism as opposed to a remedies mechanism, the focus of assessment must be on the Bank's compliance with its policies and procedures. Moreover, Management will no longer be allowed to submit remedial action plans before the Board of Executive Directors considers the Panel's recommendation on whether to investigate. They expressly forbid Management from so doing, because the Board has tended in such cases not to authorize an investigation, but to ask the Panel to assist in the supervision of the implementation of the action plan. Finally, the 1999 Clarifications make clear that the Panel process only relates to serious failures that are attributable exclusively or partly to the Bank, but not to the borrowers' failures.

⁶⁷ Compare D.D. Bradlow, *Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel*, in: <http://www.wcl.american.edu/pub/humright/brief/v6i3/ngocampaign.htm> (visited: 1 March 2001).

⁶⁸ Compare the requests of such type in the following cases: *Nigeria: Lagos Drainage and Sanitation Project* (IDA Credit No. 2517-0, 25 June 1998); *Brazil: Land Reform and Poverty Alleviation Pilot Project* (Loan No. 4147 BR, 14 December 1998); *Brazil: Rondonia Natural Resources Management Project* (Loan No. 3444 BR, 19 June 1995). See the cases compiled by Roos (note 65), at p. 487, note 71.

cerned⁶⁹. As to the consequences of the Inspection Panel's investigations and recommendations, about half of all requests to date have resulted in some success not only for the requesters, but also for other project-affected people, and the environment⁷⁰.

b) A model for the EC and GEF?

There may be doubts whether Inspection Panel proceedings are really quasi-judicial in nature. Bradlow is certainly right by stating that the Panel is a body "lying closer to the non-judicial end of the supervisory system than to the judicial end"⁷¹. In any case, the Inspection Panel mechanism may serve as a model for other international organizations, such as the European Community (EC) and the Global Environment Facility (GEF):

(1) The EC, in the framework of its regional policy, supports the achievement of its economic and social cohesion through a number of financial instruments⁷². The relevant operations are similar to those undertaken by the World Bank. Consequently, an accountability mechanism pursuant to the model of the World Bank's Inspection Panel should be established with the EC Commission for the purpose of making inquiries about the EC's failure to comply with its operational guidelines, upon request by any community of persons, including local NGOs which are affected or likely to be affected by an EC-funded project. The EC Commission should be responsible for ensuring that the EC only supports developmental projects which have regard for the vital interests of people living in the area concerned. As far as the environment in a project area is concerned, the EC's internal operational guidelines should follow generally accepted environmental standards, such as those laid down in the 1985 EC Directive on Environmental Impact Assessment (EIA)⁷³, as amended in 1997⁷⁴. In principle, Art. 6 of the EC Treaty makes plain that "(e)nvironmental protection requirements must be

⁶⁹ See the cases: *China: Western Poverty Reduction Project*; *Argentina: Special Structural Adjustment Loan* (Loan No. 4405-AR, 26 July 1999); *Kenya: Lake Victoria Environment Management Project*; *Ecuador: Mining Development and Environmental Control Technical Assistance Project*; *ibid.*, at p. 487, note 72.

⁷⁰ In this sense Roos, *ibid.*, at p. 510.

⁷¹ D.D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, *Virginia Journal of International Law* 34 (1994), 553, at 602.

⁷² Under Title XVII ("Economic and Social Cohesion") of the EC Treaty the European Community pursues a policy aimed "at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions or islands, including rural areas" (Art. 159). The Community supports the achievement of these objectives by the action it takes through the Structural Funds (in accordance with Art. 159 of the EC Treaty "Structural Funds" means "European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund"), the European Investment Bank and the other existing financial instruments. In addition, a Cohesion Fund shall provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure (Art. 161).

⁷³ EC Environmental Impact Assessment (EIA) Directive 85/337/EEC of 27 June 1985; O.J. L 175/40.

⁷⁴ EC EIA Amendment Directive 97/11/EC of 3 March 1997; O.J. L 73/5.

integrated into the definition and implementation of the Community policies and activities referred to in Article 3⁷⁵, in particular with a view to promoting sustainable development". However, to date, the EC has not yet committed itself to meeting the EIA requirements within the framework of its regional policy.

(2) The Global Environment Facility (GEF) is a permanent financial mechanism that provides grants and concessional funds to developing countries for projects and other activities designed to protect the global environment⁷⁶. NGOs have had a role in shaping the GEF and its agenda from the very beginning. More than 150 GEF-financed projects are executed or co-executed by, or contain contracts or sub-contracts involving, non-governmental groups. NGO participation is crucial not only at the project level but also in GEF policy dimensions.

While NGOs were excluded from formal decision-making processes of the GEF during its pilot phase, today they have observer status at the GEF Council meetings. Moreover, they participate in the GEF process of project preparation and execution. Pursuant to the 1994 GEF Instrument⁷⁷ the GEF Implementing Agencies may make arrangements for GEF project preparation and execution by, *inter alia*, NGOs. In particular local NGOs, with their understanding of local conditions, broad ties to local communities, and great field implementation capacities, work in indispensable partnership with the Implementing Agencies of the GEF. They can help tailor a project funded by the GEF to respond to the needs and conditions of the local communities in the areas concerned⁷⁸.

Thus, NGOs are involved similarly in the GEF's project funding policy and the respective World Bank operations. All this speaks in favour of establishing an inquiry body with the GEF Secretariat which follows the example of the World Bank's Inspection Panel. The "1994 GEF Instrument" suggests that the GEF members might be open to such a solution by stating: "In the event of disagreements among the Implementing Agencies or between an Implementing Agency and any entity concerning project preparation or execution, an Implementing Agency or any entity referred to in this paragraph may request the Secretariat to seek to resolve such disagreements"⁷⁹.

⁷⁵ Among these policies and activities mentioned in Art. 3 is "the strengthening of economic and social cohesion" (*lit. k*).

⁷⁶ The Global Environment Facility (GEF), established by World Bank Resolution No. 91-5 of 14 March 1991, was transformed in 1994 from an experimental program into a permanent financial mechanism. This was done by the adoption of the Instrument for the Establishment of the Restructured Global Environment Facility of 16 March 1994; see its text in: ILM 33 (1994), 1273.

⁷⁷ Para. 28 of the Instrument; *ibid.*, 1292.

⁷⁸ Compare D. Reed, *The Global Environment Facility and Non-Governmental Organizations*, *The American University Journal of International Law and Policy* 9 (1993), 191 *et seq.*, at 212.

⁷⁹ Para. 28 of the 1994 GEF Instrument.

2. Investigation Mechanism under the NAFTA Side-Agreement

a) Function and current practice

The North American Agreement on Environmental Cooperation (NAAEC) of 1993⁸⁰ requires the States parties Canada, Mexico and the United States to bring their environmental law into accord with its environmental obligations. Most of these obligations are procedural in nature⁸¹. The investigation process under NAAEC is designed to provide for the transnational enforcement of each party's domestic environmental law. Its underlying concept shows certain parallels to that of the human rights control systems established under regional conventions. However, it differs from the latter in one important respect: While the control mechanism under such human rights conventions is designed to insure respect for human rights only, the investigation process under NAAEC aims at enforcing unqualified domestic environmental law.

It is without parallel in environmental treaty practice that the NAAEC provides for a bifurcated mechanism of law enforcement: While the inter-State arbitration procedure⁸² is reserved to cases where a party shows a persistent pattern of failed law enforcement, a specific NGO complaints procedure can be employed in any case where a party's unqualified failure to enforce its environmental law is at stake.

Pursuant to Art. 14 of the NAAEC, the Secretariat of the North American Commission for Environmental Cooperation (NACEC) "may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law ...". Interestingly enough, any NGO "residing or established in the territory of a Party", i.e., not only the party accused in the case at hand, can bring complaints before the NACEC. This is why a U.S.-based NGO was able to bring a case before the NACEC by asserting that Canada did not comply with its environmental law⁸³.

When the Secretariat determines that the eligibility requirements have been met, it decides whether the submission merits a response from the concerned party. In light of the response provided by that party, the Secretariat may notify the Council that development of a factual record is warranted. The Council may, by a two-thirds vote, instruct the Secretariat to prepare a factual record. This record is made publicly available upon a two-thirds vote of the Council.

⁸⁰ Agreement of 8–14 September 1993; see its text in: ILM 32 (1993), 1480.

⁸¹ Pursuant to NAAEC each party has to publish promptly its laws and regulations (Art. 4); to enforce effectively its environmental laws and regulations by appropriate governmental action (Art. 5, para. 1); to ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws (Art. 5, para. 2); to ensure private access to remedies (Art. 6); and to ensure that its proceedings are fair, open and equitable (Art. 7).

⁸² See Arts. 22 et seq. of NAAEC.

⁸³ See the Factual Record for Submission SEM.97–001 (BC Aboriginal Fisheries Commission et al.), 30 May 2000, 7 et seq.

The NACEC is able to exert considerable political pressure on States parties through its authoritative findings on whether the law enforcement measures taken by a party show sufficient effectiveness. However, the Joint Public Advisory Committee to the NACEC recently found that the latter's process of reviewing private complaints should be considerably expedited in future in order to be credible with the public and to increase its effectiveness⁸⁴.

In the *BC Hydro Case*⁸⁵ Canada was blamed by a U.S.-based NGO⁸⁶ for having failed effectively to enforce section 35 (1) of the *Federal Fisheries Act against BC Hydro and Power Authority*. It was alleged that this failure permits and condones the ongoing destruction of fish and fish habitat in British Columbia. In its factual record issued on 30 May 2000⁸⁷, the NACEC increased pressure on Canada by making reference to some critical comments by an expert group on the enforcement measures Canada had thus far taken⁸⁸. While the NACEC abstained from endorsing the experts' critique, this, nevertheless, appears to be a promising method of strengthening the authority of the NACEC's findings. Once the factual record has been made public, the accused party must feel driven to reconsider duly its enforcement measures.

b) A model for enforcing the Aarhus Convention?

The NAAEC investigation process providing for the transnational enforcement of domestic environmental law is still without parallel in international environmental practice. In assessing whether it may serve as a model for other regimes of cross-border environmental cooperation, it should be noticed that this mechanism considerably differs from that of compliance control employed in a number of modern environmental agreements. While the former is designed to control the enforcement of the party's internal environmental law which accords with the NAAEC's standards, the latter aims at ensuring that any State party complies with its treaty obligations.

The idea that NGOs may initiate a process of compliance control has met with resistance by the States parties⁸⁹, since such control is a genuine inter-State process which does not directly affect any private interests. By contrast, a Party's failure effectively to enforce its environmental law directly interferes with relevant private interests. Consequently, it appears to be legitimate to allow NGOs to place blame for such failure by making submissions to the NACEC on behalf of the affected individuals.

⁸⁴ The Committee's advisory opinion of 6 June 2001 is reported in: IER 24 (2001), 521 et seq.

⁸⁵ See note 83.

⁸⁶ On 2 April 1997 the Sierra Legal Defense Fund and the Sierra Club Legal Defense Fund (now Earthjustice) jointly filed a submission with the Secretariat of the NACEC, pursuant to Art. 14 of the NAAEC. The submission was filed on behalf of a number of NGOs from Canada and the United States.

⁸⁷ See the Factual Record cited above, note 83.

⁸⁸ Compare *ibid.*, paras. 142 et seq.

⁸⁹ See for more details below under IV.

Under many inter-State agreements on cross-border environmental cooperation, in particular those on shared international watercourses, intergovernmental commissions have been established⁹⁰. However, to date none of them is entitled to consider NGOs' complaints about a contracting party's failure effectively to enforce its domestic environmental law⁹¹.

At best, the NAAEC could serve as a model for those international environmental agreements structured in about the same way as the NAAEC. Among the very few agreements of this type are the 1974 Nordic Convention on the Protection of the Environment⁹², the 1993 European Council Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment⁹³, and in particular the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁹⁴.

The Aarhus Convention aims at protecting "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (Art. 1). In order to achieve this aim each Party shall in particular guarantee the rights of access to information (Art. 4), public participation in decision-making processes (Arts. 6–8), and access to a court of law (Art. 9). Some of these procedural rights are owed to "the public" or "the public concerned". These terms mean not only natural persons, but also legal persons, including NGOs. According to Art. 2, para. 5, of the Convention " '(t)he public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirement under national law shall be deemed to have an interest". Thus, the NGOs are certainly among the beneficiaries of these procedural rights.

⁹⁰ Under a considerable number of agreements on European watercourses such as the Rhine and the Danube river intergovernmental commissions have been established which are charged with functions of monitoring and treaty implementation; for a survey see U. Beyerlin, *Umweltvölkerrecht* (2000), 91 et seq.

⁹¹ With the Boundary Waters Treaty of 1909, the Great Lakes Water Quality Agreements of 1972/1978, and the Air Quality Agreement of 1991, a remarkable system of cross-border environmental cooperation also exists in the Canada-US border region. Established on the basis of the 1909 Boundary Waters Treaty the mixed International Joint Commission (IJC) has been established which is endowed with an array of administrative, investigative, and arbitral responsibilities. However, in practice, its functions have been largely limited to scientific and technical investigations. Its freedom from political pressure has allowed it to maintain its highly cooperative character. Nevertheless, the United States and Canada will hardly ever be ready to widen the investigative powers of the IJC in such a way that it may receive NGO complaints asserting that a State party fails to enforce effectively its environmental law. See D.K. DeWitt, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, *Indiana Law Journal* 69 (L) 1993, 299, at 313 et seq.; compare also Wm.C. Muffett, *Environmental Cooperation in North America*, in: F.L. Morrison/R. Wolfrum (eds.) *International, Regional and National Environmental Law* (2000), 505, at 509 et seq.

⁹² Convention of 19 February 1974; see its text in: UNTS 1092, 279.

⁹³ Convention of 21 June 1993; see its text in: ILM 32 (1993), 1230.

⁹⁴ On 6 June 2001 the Aarhus Convention of 25 June 1998 (see its text in: ILM 38 [1999], 517) received its 16th ratification (Estonia), meeting the requirement for its entering into force (30 October 2001).

The dispute settlement clause in Art. 16 of the Aarhus Convention addresses only the possibility for States to initiate judicial proceedings⁹⁵. It may, therefore, be asked whether this Convention could be better enforced if there were an investigation mechanism available for groups of individual persons and NGOs such as that under the NAAEC. Amending the Convention to this end would be desirable, as the Convention assigns a number of procedural rights to NGOs. Taking into account that under Art. 15 of the Convention the parties are bound to "establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance ...", which "shall allow for appropriate public involvement and may include the option of considering communications from members of the public ...", such an amendment might be achieved.

IV. NGO Participation in Controlling Compliance with International Environmental Agreements

States show considerable reluctance to become involved in adversarial proceedings before international courts. This is why NGO participation in non-adversarial compliance control procedures gains more and more importance in international environmental treaty practice. For instance, the relevant procedures under the Montreal Protocol of 1987⁹⁶ and the Protocols to the Geneva Convention on Long-Range Transboundary Air Pollution of 1979⁹⁷ are inspired by the idea of partnership instead of confrontation. They focus on cooperative rather than repressive means of law enforcement⁹⁸.

In any case where a State is suspected of non-compliance with its treaty obligation, the establishment of relevant facts is central, because uncertainty and disputes over facts relating to compliance carry considerable potential for conflict. The treaty organ which is competent for performing the compliance control procedure cannot rely only on the reports of the State suspected of non-compliance, but is in need of obtaining additional information from other sources; among them are other States parties, on-site inspections, and last, but not least, NGOs.

Thus, NGOs can contribute to compliance control by providing information on whether a particular contracting party sufficiently complies with its obligations. Such information may serve as a "counterpoint" or "substitute" for data States have failed to provide⁹⁹. However, there is urgent need for a closer specification of the status and function of NGOs with regard to compliance control. In future, information from non-governmental sources should be given greater weight and formally integrated into compliance control.

⁹⁵ Disputes arising between States parties about the interpretation or application of the Convention, in the last resort, may be submitted to the ICJ or an arbitral tribunal (Art. 16 and Annex II). As shown above, NGOs do not have access to these courts.

⁹⁶ Protocol of 16 September 1987; see its text in: ILM 26 (1987), 1550.

⁹⁷ For a survey of the Geneva Convention and its protocols see Beyerlin (note 90), 155 et seq.

⁹⁸ See for more details *ibid.*, 241 et seq.

⁹⁹ Compare Riedinger (note 2), 262 et seq.

When reforms are considered, it should be remembered that the inter-State character of the proceedings must be maintained, even if NGOs are to be involved in them. Moreover, a precondition for strengthening the role of NGOs in the further development of compliance control mechanisms should be the fulfillment of certain legitimization criteria, such as the NGOs' closeness to the subject-matter.

The non-compliance procedure, such as that adopted under the Montreal Protocol, aims at deciding on possible responses to compliance problems. This procedure can be initiated by non-concerned States parties, the Secretariat or even by the non-complying State itself, but not by NGOs¹⁰⁰. During the negotiations over the Montreal non-compliance procedure, States decided against the initiation of the procedure by NGOs or individuals¹⁰¹. There was fear by States parties about the restrictions on sovereignty implicit in this. In fact, such an initiating role of NGOs would be in conflict with the procedure's non-confrontational character.

V. Conclusion

Today, NGOs still play a very modest role in international environmental litigation. They are barred from being admitted as parties or third parties in the proceedings of most international courts. At best, they can submit ecological human rights complaints to the courts established under the European, Inter-American and African human rights systems. International courts show considerable reluctance to accept NGOs even as *amici curiae*, with the exception of the WTO Appellate Body which recently developed a rather friendly NGO policy.

More promising is the role NGOs can play in international quasi-judicial proceedings. There are two important examples in this respect. First, NGOs are entitled to initiate an investigation process headed by the World Bank's Inspection Panel which aims at detecting any failure by the World Bank to comply with its operational standards, provided that such failure affects the (environmental) interests of individuals concerned by a Bank-funded project. Second, under the NAFTA Side-Agreement (NAAEC), NGOs can request the Commission of Environmental Cooperation (NACEC) to investigate into any alleged failure by a State party to the NAAEC to enforce its domestic environmental law. Although both investigating bodies cannot make legally binding decisions, their factual findings, if made public, can help to redress (environmental) harm from private individuals. Thus, both NGO-initiated investigation processes may serve as models for making other international environmental treaty regimes more effective in future.

¹⁰⁰ See M. Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht. Verfahren der Erfüllungskontrolle in der umweltvölkerrechtlichen Vertragspraxis* (2000), 161, with further references. Compare also Riedinger, *ibid.*, 272 et seq.

¹⁰¹ See e.g. P. Szell, *The Development of Multilateral Mechanisms for Monitoring Compliance*, in: W. Lang (ed.), *Sustainable Development and International Law* (1995), 97, at 100.

In conclusion, there are three options for strengthening the role of NGOs in international environmental litigation: First, in ecological human rights cases the regional courts concerned should be prepared to grant NGOs broader standing; in particular, the latter should be entitled to make claims also on behalf of affected individuals. Second, international courts and tribunals should develop a more liberal attitude towards NGOs offering their assistance as *amici curiae*. Third, the possibilities for NGOs to initiate international quasi-judicial procedures aimed at investigating environmental misconduct should be widened.

However, a caveat has to be made. For years, an ever-growing number of NGOs and other non-State actors with varying reputations and expertise is flooding the international environmental scene. Thus, it appears to be appropriate that any decision on NGO participation in international judicial and quasi-judicial proceedings be left to the discretion of the bodies concerned. The latter should make their decision depending on whether an NGO applying for access fulfils certain minimum requirements or not. Such requirements should be laid down in the rules of procedure of the bodies concerned, rather than established on an ad hoc basis. ECOSOC Resolution 1296 of 23 May 1968, which created the institutional framework for a graded system of consultative relations between ECOSOC and NGOs, offers some guidance for the determination of relevant minimum requirements to be met by any NGO wishing to participate in the proceedings as a party, third party or *amicus curiae*¹⁰². Among these requirements should be: the NGO's representative character, its own affectedness or legitimacy to act on behalf of affected third persons, its specific skills and expertise in environmental affairs, and its accountability for actions taken. As a rule, NGOs which meet these requirements ("qualified" NGOs) should be held eligible as requesters in investigation proceedings before international quasi-judicial bodies. Furthermore, courts should commit themselves to consider duly any non-requested *amicus* briefs submitted by "qualified" NGOs. Equipping courts and quasi-judicial bodies with clear guidelines for measuring the eligibility of NGOs would help to make that process more calculable and transparent. Clarifying the conditions of NGO access to international courts and quasi-judicial bodies in such a way would strengthen the position of NGOs which meet the eligibility conditions, thus proving them be genuine representatives of civil society. Such a "separation of the wheat from the chaff" in the selection process would considerably enhance the chances of "qualified" NGOs to have a powerful voice in international environmental litigation.

¹⁰² The Resolution makes plain that each consultative NGO must be concerned with matters falling within the competence of ECOSOC and conform with the spirit, purposes and principles of the UN Charter. Furthermore, it "shall be of representative character and of recognized international standing"; it shall have an established headquarter with an executive officer at its disposal and have a "democratically adopted constitution".